Supreme Court, U.S.
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No. 04-517

In The

Supreme Court of the United States

CHRISTOPHER VILLAGE, L.P. and WILSHIRE INVESTMENTS CORP.,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals For the Federal Circuit

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PETITION FOR REHEARING

E. Grey Lewis
Counsel of Record for Petitioners
1825 I Street, N.W., Suite 400
Washington, D.C. 20006
(202) 429-2082

March 18, 2005

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GROUNDS FOR REHEARING

In support of this petition for rehearing, Petitioners present the following substantial grounds not previously presented:[1]

I. The Government's opposition to the petition for certiorari filed in this case was based on its erroneous assertion that "even if the petitioners were correct that the Fifth Circuit properly exercised jurisdiction over petitioners' declaratory judgment action it would not affect the judgment in this case, which rests on the independent ground that MAGI's fraud constituted a prior material breach that justified foreclosure." Resp. Br. at 14.

The tortuous route used by the Government to impute fraud to petitioners, adopted by the trial court, and rubber stamped by the Federal Circuit has before and since been discredited by every court to consider the issue including the Court of Federal Claims. *Long Island Savings Bank, FSB v. United States,* 54 Fed.Cl. 607(2002) ("*Long Island Savings Bank*")

First and foremost, the Government must show that the contractor in privity with the Department of Housing and Urban Development ("HUD") knew of the misrepresentation that is the basis for the fraud claim. Id. at 616. Here, Petitioners knew nothing of the fraud and there was no evidence to suggest otherwise. Amounts fraudulently obtained by insurance brokers were spread over 160 insurance policies for 160 different properties and were so small for each property as to be undetectable.

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[1] These grounds would have been discussed in a reply had E. Grey Lewis who represents Petitioners not been undergoing surgery and treatment for cancer at the time the reply was due.

Second, "[u]nder the law of imputation, courts impute the fraud of an officer to a corporation only when the officer commits the fraud (1) in the course of his employment, and (2) for the benefit of the corporation." Id. At 618. Here, Petitioners received no benefit from the fraud and there was no evidence to suggest otherwise.

Third, the 160 HUD assisted properties, including Christopher Village, were never charged with committing fraud and were expressly absolved of any involvement in the fraud in the settlement agreement and consent order entered by Judge Conti, United States District Court for the Northern District of California.

Fourth, the uncontroverted evidence showed that: MAGI's -- the entity committing the fraud -- only involvement with Petitioners was its fraction of one percent indirect interest in Petitioner Christopher Village. MAGI never furnished inflated insurance invoices to the HUD subsidized housing projects. The insurance brokers, such as Polar, "invoiced and collected" from the covered properties the required insurance coverage which included a "hidden" fee "in the total premium billed to the projects." As the office of the U.S. Attorney for the Northern District of California concluded, these hidden fees were charged "in amounts that would not raise suspicion." Thus, the invoices "included the true cost of insurance and an additional amount (av. $2,000) specified by Mr. Penn to cover the fees to him." JA Fed. Cir. 2300-2301.

The owners of these projects, the contractors in privity with HUD, as Christopher Village, hired managers, with the approval of HUD, to maintain and operate the low-income

multifamily housing, which included processing the rent requests. By press release dated March 30, 2001, the U.S. Attorney, N.D. Calif., stated that the "managers of the HUD subsidized housing projects did not know about these added fees . . . ." JA Fed. Cir. 281.

Fifth, there is no prior material breech. The requisite insurance coverages were obtained by the owner/manager as required by the Regulatory Agreement as well as all the other approximately 50 line items for the administrative, utilities, operating and maintenance expenses included in rent increase requests. JA Fed. Cir. 2721-2722, 2213-2217. It is clear from the evidence that the housing projects and their management agents knew nothing of these added fees, that were in amounts that would not raise suspicion. Also, the insurance broker invoiced and collected the inflated insurance fee for P.L. Acquisition. Not one single penny went to the low-income housing owners, such as Christopher Village. This scheme did not benefit Christopher Village in any way nor was it designed to.

Sixth, Mr. Gillingham stated at a status hearing that "Legally, I think I would have to move to amend the complaint, frankly, and I would have to, of course, get permission from the fraud people here to do that." (emphasis added) JA Fed. Cir. 276. Judge Firestone, effectively acting as co-counsel, told Mr. Gillingham to file this "independent fraud ground" quickly. JA Fed. Cir. 276, 278. No counterclaim, or special plea in fraud, 28 U.S.C. 2514, or False Claims Act, 31 U.S.C. 3729(a) violation was ever filed against the contractor Christopher Village by the government. No testimony or affidavit was ever presented by the government in support of its position.

Not one person involved in the Global Settlement for the government from the N.D. Calif. has supported the Firestone, Gillingham assertions or disputed the affidavit of

Daniel S. Floyd submitted by Christopher Village. Attorney Floyd was intimately involved in the entire settlement process. Ms. Floyd's affidavit states that the Administrative Agreement was "specifically intended to make clear that all Defendants were not now, or previously, in default in any HUD obligations, including those under any Regulatory Agreement based on the global settlement." JA Fed. Cir. 268-269.

Seventh, Judge Firestone's *de facto* finding all 160 owners guilty of every conceivable criminal fraud act also was in direct violation of the Tombar Memorandum of April 3, 2001. JA Fed. Cir. 259. Mr. Tombar, the Acting Deputy Assistant Secretary for Multifamily Housing Programs at HUD, specifically stated to all officers of that agency the following: "This is to advise you that neither the underlying conduct that was the subject of the Department of Justice criminal and civil actions, nor the fact of the execution of the Settlement Agreement, . . . is to be held against AFC or Penn or their affiliates in any 2530 application or other submission that they may transmit to HUD." In the instant matter, Christopher Village submitted to HUD a unanimous Fifth Circuit panel opinion detailing that agency's illegal shifting in the middle of a contract the responsibility for payment of capital items and deferred maintenance from the public sector to the property owners. Furthermore, the then Solicitor General ordered that there be no appeal of this opinion.

As in *Long Island Savings Bank*, where the Court concluded the Bank had not acted fraudulently, *Id.* at 619-20, the government has not established that the contractor Christopher Village and its management agent, Byram Properties, had any knowledge of these hidden added fees, that were in amounts that would not raise suspicion. Christopher Village did not obtain one penny from this insurance scheme and the perpetrators of the fraud did not

act on behalf or for the benefit of the corporate entity Christopher Village. The actions of MAGI, which owned a minuscule indirect interest in Christopher Village, cannot be imputed to Christopher Village.

II. The United States could have – but did not --raised the fraud issue before the Fifth Circuit. After all, the fraud case was prosecuted by the Department of Justice at the same time as the *Christopher Village* case was before the Fifth Circuit.

III. Subject to an extremely narrow exception, "[A] federal court always has jurisdiction to determine its own jurisdiction." United States v. Ruiz, 536 U.S. 622, 628 (2002). If the lower federal court is wrong "and if the [Supreme Court] had no jurisdiction of the appeal . . . [the Supreme Court] alone, could decide that such was the law." *United States v. Mine Workers,* 330 U.S. 258, 291 (1947).The Federal Circuit has eviscerated this rule.

The Federal Circuit relied on *Kalb v. Feuerstein*, 308 U.S. 433 (1940). In *Kalb v. Feuerstein*, the Court held a narrow exception existed when a state court ignored the stay issued by a United States Bankruptcy Court and foreclosed on a farmer's property. In a second action in state court that reached the Supreme Court, the Supreme Court held that even though the issue of the state court's jurisdiction had not been raised on appeal to the state supreme court in the initial action, the Supreme Court held that the initial foreclosure action was void.

This narrow exception does not allow the Federal Circuit to review collaterally a final, unappealed judgment of the Fifth

Circuit. This heretofore well-accepted principle has even been accepted by the Federal Circuit, albeit by a different panel than in Christopher Village. *Faust v. United States*, 101 F.3d 675 (Fed. Cir. 1996)

IV. The Federal Circuit has overruled *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978).

In *Duke Power*, the Court held:

> Appellees are not seeking compensation for a taking, a claim properly brought in the Court of Claims, but are now requesting a declaratory judgment that since the Price-Anderson Act does not provide advance assurance of adequate compensation in the event of a taking, it is unconstitutional.

Id. at 71 n.15.

Here, petitioners were not seeking money damages in the District Court, but rather, attempting to enjoin HUD from taking their property.

In the future, HUD can do precisely what it did here. Ignore a declaratory judgment entered by an Article III court and have the Federal Claims Court invalidate the declaratory judgment if and when the aggrieved party seeks money damages for HUD's actions.

The holding allows the Federal Circuit to review and reverse – not just refuse to accord *res judicatæ* ffect to – the final judgment of another Court of Appeals. This affects anyone seeking judicial review of an agency decision if that decision

could conceivably affect the payment of money by the United States.

The holding gives license to HUD to ignore final Court of Appeals and district court decisions affecting the payment of money pending "review" by the Federal Circuit, which can take years. In this case, for example, five years elapsed from the date of the Fifth Circuit decision until its reversal by the Federal Circuit.

V. Another panel of the Federal Circuit that included a member of the panel that decided the instant case clearly disagrees with the opinion in the instant case. In *Katz v. Cisneros*, 16 F.3d 1204 (Fed. Cir. 1994), a contractor challenged in district court HUD's calculation of contract rents under the contract with HUD. The contractor alleged, inter alia, breach of contract by HUD. There, the court held:

> Regardless of the characterization of the case ascribed by Hollywood Associates in its complaint, we look to the true nature of the action in determining the existence or not of jurisdiction. Livingston v. Derwinski, 959 F.2d 224, 225 (Fed.Cir.1992) (citing Williams v. Secretary of the Navy, 787 F.2d 552, 557 (Fed.Cir.1986); Chemical Eng'g Corp. v. Marlo, Inc., 754 F.2d 331, 333 (Fed.Cir.1984)). For reasons discussed below, we disagree with HUD's contention that the essence of Hollywood Associates' suit is contractual and that money damages are the appropriate relief. Even where a case is contractual, however, the presence of issues which require the interpretation of federal law and regulation necessarily give rise to federal questions. See Conille v. Secretary of Housing and Urban Development, 840 F.2d 105, 109 (1st Cir.1988) ("It is well established that cases involving the rights and obligations of the United

> States or one of its agents under a contract, entered into pursuant to authority conferred by federal statute, are governed by federal law."). The district court has subject matter jurisdiction under section 1331.

Katz, 16 F.3d 1207-1208

VI. At least 50,000 limited partners whom Congress beseeched to invest in HUD insured or assisted property have either paid the extortion demanded by HUD, which the Fifth Circuit found illegal, or suffered illegal loss of their private property and the substantial tax penalties of foreclosure. Despite a unanimous panel of the Fifth Circuit finding HUD's actions in this regard to be illegal, none of these citizens will receive the benefit of the Fifth Circuit decision to which they are entitled.

CONCLUSION

Petitioners request that their petition for a writ of certiorari be granted.

Respectfully submitted,

E. Grey Lewis
Counsel of Record for Petitioners
1825 I Street, N.W.,
Suite 400
Washington, D.C. 20006
(202) 429-2082

CERTIFICATION

This petition for rehearing is presented in good faith and not for delay.

E. Grey Lewis
Counsel of Record for Petitioners
1825 I Street, N.W.,
Suite 400
Washington, D.C. 20006
(202) 429-2082